

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON**

In re the Marriage of:)	
)	No. 56037-9-I
NORMA ANN SARBACH,)	(consolidated w/56730-6-I)
)	
Respondent,)	DIVISION ONE
)	
and)	
)	
MICHAEL WILLIAM SHELTON,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 31, 2006
)	

PER CURIAM – Michael Shelton appeals from an order denying his motion under Civil Rule 60 to vacate the orders entered when the trial court dissolved his marriage to Norma Sarbach. The trial court properly denied the CR 60 motion because the errors Shelton alleged were not clerical and Shelton did not bring the motion within a reasonable time. We affirm.

Sarbach and Shelton married on July 3, 1994. They separated on October 15, 2003. They have no children. Sarbach petitioned for dissolution in Snohomish County Superior Court in April 2004.

At trial in January 2005, the parties primarily disputed the status and value of their houses, cars, and gifts from Sarbach's parents. For

example, Sarbach used \$30,000 given to her by her parents as a down payment on a house that the couple bought in Everett before they were married. The parties disagreed about whether the \$30,000 was intended as a gift or a loan. The court found that the money was intended as a loan, but that \$7,000 of it was given as a wedding gift. The couple repaid \$8,000 of the loan. The court found that the remaining \$15,000 debt was forgiven as a gift to Sarbach. The court found that the Everett house was community property, but Sarbach had a \$15,000 separate property interest in it. Likewise, another house in Oak Harbor was community property, but Sarbach had a \$12,000 separate property interest in it based upon her contribution of separate funds for the down payment.

Similarly, the court found that Sarbach bought her Subaru during the marriage for \$23,000 with \$10,000 of her separate property. Therefore, she had a \$10,000 separate property interest in the Subaru and a 43.47 percent community property interest in the car's value at dissolution.

Out of the approximately \$70,000 received from Sarbach's parents during the couple's cohabitation and marriage, the court found \$55,000 to be Sarbach's separate property. Approximately \$7,000 of that amount remained in Sarbach's possession. The court awarded Sarbach \$43,814 as her separate property.

The court also found that after Sarbach asked Shelton for a divorce, Shelton, without consulting Sarbach, sold at a loss a community interest in

Microsoft stock valued at \$5,752.63 and did not account for the funds. He also took a \$4,157.89 cash advance from an account used primarily by Sarbach without accounting for the funds or showing a community purpose for them. The court allocated both amounts as property awarded to Shelton.

The court awarded Shelton the Everett house, which had a net value of \$140,552. Sarbach was awarded the Oak Harbor house, which had a net value of \$51,467. The court awarded each party his or her retirement account.

The court ordered Shelton to pay Sarbach to equalize the awards: "To reach an equalization and reimburse Wife, the Husband must make an equalization/transfer payment to Wife of \$83,900.57."

Consistent with the disposition of the property, the court ordered Shelton to remove Sarbach's name from any bank or credit accounts on which her name appeared as a joint owner or obligor within 10 days and from the mortgage on the Everett house by May 6, 2005.

The court found that Sarbach proved by a preponderance of the evidence her claim that Shelton committed "certain 'foot dragging' sorts of discovery violations." The court also found, however, that Sarbach's attorney "acted in a manner constituting intransigence by engaging in intimidating and insulting behavior, failed to negotiate a settlement in good faith, and committed her own discovery violations." Therefore, despite

requests by both parties, the court did not award attorney fees or costs to either party.

The court announced its oral decision on February 15, 2005. On March 7, 2005, when the court entered its findings and conclusions, decree, and judgment, neither Shelton nor his attorney was present. But on March 17, 2005, Shelton asked the court to reconsider its oral decision and its findings and conclusions and decree of dissolution.

Shelton argued in his motion for reconsideration that the trial court erred when it credited him with the value of the Microsoft stock that was sold before the couple separated. He claimed that, because the investments were sold, they were not available for distribution at trial. He also disputed that Sarbach possessed “residual ‘gift funds’” as her separate property at the time of trial. He disputed the court’s valuation of property, including the value of Sarbach’s retirement account, which he claimed increased in value during the marriage as a direct result of his “investment efforts.” Shelton also asked the court to reconsider many of its other findings and conclusions.

On March 23, 2005, Sarbach moved for an order of contempt based in part upon Shelton’s non-compliance with the court’s order requiring Shelton to remove Sarbach’s name from joint property. Additionally, she presented evidence that Shelton was attempting to sell the Everett house, rather than refinance it to remove the encumbrance from her name. She asked the court to order Shelton to immediately comply with the court’s orders, find him in

contempt, and/or sanction him for CR 11 violations.

On March 21, 2005, Shelton's counsel withdrew and new counsel substituted. Ten days later, the court heard Shelton's motion for reconsideration and Sarbach's motions for contempt, to compel, and for sanctions. The court denied Shelton's motion for reconsideration because its service was untimely under CR 59. The court denied Sarbach's motion to compel and for contempt, in part because the time for compliance had not expired yet and Shelton offered to prove he had complied. The court found that Shelton's counsel violated CR 11 by making at least one false statement and others that were of "questionable validity," but the court determined that a warning was the appropriate sanction.

Shelton filed a notice of appeal on April 6, 2005. Sarbach filed a cross-appeal on April 20, 2005. She later voluntarily withdrew her cross-appeal.

On May 25, 2005, Shelton filed a motion for an order requiring Sarbach to show cause why the findings and conclusions, decree, and judgment should not be vacated under CR 60(a) and (b)(1), (6), and (11). He made essentially the same arguments in his motion to vacate under CR 60 as he made in his motion for reconsideration.

In response to Shelton's motion to vacate, Sarbach moved for an order striking the motion, denying Shelton relief, and quashing the order to show cause. Sarbach argued that the court lacked jurisdiction to entertain a CR 60

motion because this court had already accepted review. Sarbach asked the trial court to strike the documents that Shelton had submitted with his post-trial motions, including his financial and personal declarations, which were not produced in discovery, were not admitted at trial, and contravened the parties' stipulation, CR 2A,¹ CR 43(a)(1),² and CR 59(g).³ Sarbach also asked the court to find Shelton in contempt and enter a variety of other findings, orders, and sanctions.

On June 24, 2005, the court orally denied Shelton's motion to vacate. First, the court held that Shelton was not entitled to relief under CR 60(a) because the errors he alleged were not clerical errors.

Next, the court rejected Shelton's request for relief under CR 60(b). The court concluded that Shelton's motion to vacate was not filed within a reasonable time. Shelton filed the motion 78 days after the court entered its written decision and 100 days after the court announced its oral decision. The court asserted that a reasonable time for Shelton to bring his CR 60(b) motion would have been before Shelton's deadline for complying with the court's order had passed:

And here is the main reason I say this, counsel and Mr. Shelton, the deadline was real clear. We spent a lot of time on that

¹ CR 2A relates to stipulations.

² CR 43(a)(1) provides that the testimony of witnesses in all trials "shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute."

³ CR 59(g) allows the court, on a motion for a new trial in an action tried without a jury, to "take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

at the time of written presentation of orders. It was not the deadline that was proposed by Petitioner, it was the deadline that was changed by the Court in order to create what I thought was a reasonable period of time to get this done. I extended it about twenty days, I think, from the proposal.

Now the reason I think that a motion of this sort is unreasonable, because if I set a deadline for complying with the Court's order and then you let that deadline pass and then you file a motion, that basically allows you to evade the Court's order by a motion practice. And I don't think the rules contemplate that, that's not how the game is played, and I think that's what you're doing.

The court explained that granting relief under CR 60(b) also was not appropriate because Shelton was alleging errors of law that should be corrected by appeal and not by a CR 60(b) motion. Moreover, Shelton had already filed an appeal. Also, the court explained, a change in facts after the judgment was entered is not grounds for vacation under CR 60(b)(11). Rather, the court said, only extraordinary circumstances justify vacation under that section of the rule, and what Shelton was alleging was not extraordinary:

Now I think it's almost blatantly clear that these are not extraordinary circumstances. This motion is trying to change the facts that were determined at trial. It is proposing information in the form of declarations that was available at trial, that was requested in discovery, that was ruled on at the beginning of trial by stipulation, and there was no cooperation in producing that information. And now all of a sudden here it is, a hundred days after the trial.

So since this motion tries to change the facts of the decision by introducing facts not considered at trial, it fails for this reason also.

The court also concluded that striking Shelton's motion to vacate was an appropriate sanction for CR 11 violations, including false statements in pleadings and discovery violations. The court found Shelton in contempt.

On July 7, 2005, the court entered an order finding Shelton to be in

contempt for intentionally failing to comply with the order requiring him to remove Sarbach's name from the mortgage on the Everett property and failing to make the transfer payment. The court found that Shelton understood and was capable of complying with the court's order; he was able to refinance or sell the Everett house and had sufficient funds in his retirement account to pay the judgment against him, yet he was unwilling to take the steps necessary to comply with the court's order.

The court ordered that Shelton would incur a penalty of \$100 per day until a review hearing was held on August 25, 2005. Shelton could purge the contempt order, including all monetary sanctions, if he completed the transfer payment to Sarbach and removed her name from the mortgage documents by August 23, 2005. If he did not comply by that date, he was required to appear before the court for a contempt review hearing on August 25, 2005. The court reserved entry of the judgment summary and ruling on whether to award attorney fees and costs until the review hearing. The court denied Shelton's CR 60 motion and granted Sarbach's motion to strike in all respects.

On August 5, 2005, Sarbach filed a motion for contempt, for CR 11 sanctions, and for correction or clarification that the court struck Shelton's declaration and other submissions that he made in support of his motion for reconsideration and motion to vacate. Sarbach contended that Shelton's attorney violated CR 11 by designating those stricken documents as part of

the record on appeal.

At the review hearing on August 25, 2005, the court found that the sanctions against Shelton were justified and sufficient grounds existed to grant Sarbach's CR 60(a) motion and clarify the July 5, 2005 order by directing the clerk of the Superior Court not to transmit to the Court of Appeals the documents that Shelton submitted post-trial:

2.1 The Court finds that in its oral ruling on June 24, 2005, the Court granted Petitioner's Motion to Strike Respondent's CR 60 Motion and this included the Court's order to strike certain declarations from the record (indicated below as 80, 82, 84, and 99) because they were submitted in violation of discovery orders in place at the time of trial and as a sanction for attempting to violate those orders.

2.2 That sufficient grounds exist to grant Petitioner's CR 60(a) motion and clarify this Court's Order dated July 5, 2005 and to enter an order directing the clerk of the court not to transmit to the Court of Appeals documents 80, 84, 82, and 99.

Shelton appealed from the court's July 7, 2005 oral decision on his CR 60 motion and from the written order denying that motion and granting Sarbach's CR 60 motion and her motions for contempt and to strike. A commissioner of this court consolidated Shelton's two appeals, despite his failure to perfect his first appeal. But the commissioner ordered that the appeals would be dismissed if Shelton failed to file his opening brief and perfect the record by October 10, 2005.

Sarbach moved to modify the commissioner's ruling consolidating the appeals and allowing Shelton to proceed with his appeal. She asked the court to dismiss Shelton's appeals and award her attorney fees and costs to respond to the appeal.

Shelton moved this court to allow him to supplement the record with the stricken documents that he submitted post-trial. He attached the stricken documents to his motion. Sarbach objected to Shelton's motion. A commissioner passed the parties' motions to the panel, noting that Shelton's motion was troubling considering that the trial court had specifically excluded them from record and Shelton designated them after the briefs were filed:

While ordinarily the court would be willing to direct the superior court to transmit documents stricken by the trial court so that their exclusion could be challenged on appeal, the court is much less willing to enter such an order under the circumstances here. At this point, rather than delay consideration of this case for what appear at this point to be questionable reasons, the motion to supplement the record is passed to the panel. In the event a panel believes that the documents at issue here are indeed essential to resolving the case, the panel can direct their transmittal to this court.

On July 13, 2006, Sarbach filed a motion for partial dismissal of Shelton's appeal. In it, she argues that the part of Shelton's appeal that relates to the contempt order should be dismissed because the superior court entered an order finding that Shelton had complied with the July 5, 2006 [sic]⁴ order and was no longer in contempt. In support, she attached the superior court's April 6, 2006 order finding that Shelton was no longer in contempt. The court did not require Shelton to pay sanctions for his past contempt, but was ordered to pay \$1,500 in attorney fees. Shelton did not appeal that judgment, and a satisfaction of judgment was filed in the Superior Court.

⁴ The court obviously was referring to the July 5, 2005 order for contempt.

Analysis

We first deny Sarbach's motion to dismiss the part of Shelton's appeal that relates to the July 2005 contempt order. Although Shelton did not appeal the Superior Court's April 6, 2006 order on contempt, that order did not render moot the issues that relate to the court's previous contempt sanction striking the documents that Shelton submitted with his post-trial motions and, therefore, the motion to dismiss is denied.

But we also deny Shelton's motion to supplement the record with the stricken documents. They are not needed to resolve the case.

Shelton argues that the trial court erred when it denied his motion for relief for judgment under CR 60(a) and (b)(1), (6), and (11). CR 60(a) provides:

Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

CR 60(b)(1), (6), and (11) provide:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

should have prospective application;

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

This court reviews a trial court's decision whether to vacate a judgment or order under CR 60 for an abuse of discretion. Shaw v. City of Des Moines, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002). We will not overturn the decision unless the trial court exercised its discretion on untenable grounds or for untenable reasons. Shaw, 109 Wn. App. at 901.

A court may use CR 60(a) to correct clerical, not judicial, errors. Shaw, 109 Wn. App. at 901. A judicial error is one of substance, while a clerical error is merely a mechanical mistake. Marchel v. Bunger, 13 Wn. App. 81, 84, 533 P.2d 406, review denied, 85 Wn.2d 1012 (1975). To distinguish between "judicial" and "clerical" errors, the test is whether, based on the record, the judgment embodies the trial court's intention. Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996); Shaw, 109 Wn. App. at 901. Subdivision (a) of CR 60 does not permit a court to rethink the case and enter an amended judgment that conflicts with the judgment announced earlier. Presidential, 129 Wn.2d at 326.

As the trial court found, the errors that Shelton alleged were not merely mechanical. They were errors of substance. Even if the court's property division was erroneous or unfair, the court's written order embodied its intention and, therefore, the errors could not be corrected under CR 60(a).

The trial court also denied Shelton relief under CR 60(b). It found that Shelton's motion was not brought within a reasonable time. We agree. "In all cases, a motion under CR 60 must be brought within a 'reasonable time.'" Pitzer v. Union Bank of California, 141 Wn.2d 539, 552, 9 P.3d 805 (2000) (quoting CR 60(b)). Shelton has not shown that the court abused its discretion when it determined that his motion was untimely.

Furthermore, even if his motion had been filed in a reasonable time, Shelton did not demonstrate that he had grounds for relief under CR 60(b). He did not show the order was entered as a result of "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." CR 60(b)(1). This is particularly so because he made essentially the same arguments in his motion for reconsideration as he made in his motion to vacate, and the court affirmed that it had intended to do what Shelton argued was error.

Nor did Shelton show that the judgment had been "satisfied, released, or discharged." CR 60(b)(6). He did not argue specifically that he satisfied the judgment. Rather, his arguments merely imply that Sarbach received all she was entitled to. For example, Shelton argued that Sarbach should not

have been awarded the amount she contributed toward the purchase of the Subaru as her separate property because the court awarded her the car itself. Shelton did not show that he satisfied the judgment he owed Sarbach.

Neither did Shelton show that his motion to vacate should have been vacated under CR 60(b)(11). That section applies to situations that involve extraordinary circumstances not covered by any other section of CR 60(b). In re Marriage of Furrow, 115 Wn. App. 661, 674, 63 P.3d 821 (2003).

Irregularities that are extraneous to the court's action or that involve substantial deviations from a prescribed rule or mode of proceeding justify vacation under CR 60(b)(11); errors of law do not. Furrow, 115 Wn. App. at 674; In re Marriage of Hammack, 114 Wn. App. 805, 60 P.3d 663, review denied, 149 Wn.2d 1033 (2003). As the trial court correctly found, there was nothing extraordinary about Shelton's grounds for relief.

Attorney Fees

Sarbach asks for an award of attorney fees on appeal. RCW 26.09.140 provides for an award of reasonable attorney fees for maintaining an action under RCW 26.09. See also RAP 18.1. Based upon Shelton's ongoing intransigence and Sarbach's need compared to Shelton's ability to pay, we hold that Sarbach is entitled to her attorney fees on appeal. We direct her to comply with RAP 18.1.

Conclusion

The trial court did not abuse its discretion when it denied Shelton's motion to vacate the orders entered in the dissolution. The decision of the trial court is

affirmed. Sarbach is awarded her attorney fees on appeal.

For the Court:

Ajid, J.

Becker, J.

Grosse, J.